ESTATE OF ARTHUR C. W. BOWEN, DECEASED

IBLA 74-341 Decided January 30, 1975

Appeal from decision of the Arizona State Office, Bureau of Land Management, rejecting mineral patent application AR 030706.

Set aside and remanded.

1. Mining Claims: Determination of Validity--Mining Claims: Patent

   The Department of the Interior has the authority and the duty to contest mining claims which it believes are invalid, notwithstanding that the claims are located in a National Forest and the Forest Service has no objection to approval of a patent application.

2. Administrative Procedure: Hearings--Mining Claims: Generally--Mining Claims: Hearings--Mining Claims: Patent

   When one whose application for patent for a mining claim has been rejected requests a hearing to present evidence on the controlling issues of fact involved in the rejection of the application, such request must be granted.

3. Mining Claims: Generally--Mining Claims: Location--Mining Claims: Patent--Mining Claims: Special Acts

   If mining claimants possess the essential qualifications as to citizenship, and if they peacefully entered and occupied the land and discovered a valuable mineral deposit thereon at a time when both the

> land and the mineral were subject to appropriation under the mining laws, and if they thereafter remained in peaceful, exclusive possession and openly worked the claim for the period prescribed by the state statute of limitations for mining claims, and expended at least the minimum amount of money prescribed by law in the improvement of the claim, they have thereby established their right to receive a patent pursuant to 30 U.S.C. § 38 (1970) notwithstanding their error in locating and recording their claim under the statute pertaining to placer locations rather than properly under the lode mining law, assuming that there has been no intervening loss of discovery.

APPEARANCES: Elmer C. Coker, Esq., Phoenix, Arizona, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The estate of Arthur C. W. Bowen, deceased, has appealed from the April 22, 1974, decision of the Arizona State Office, Bureau of Land Management, which rejected applications for patent for four placer mining claims located for perlite. 1/ Essentially, the applications were rejected for lack of discovery of a valuable mineral deposit. The decision found that the perlite on the

1/ The claims are located in Sections 8, 9, and 16, T. 2 S., R. 12 E., GSR Meridian, Pinal County, Arizona, in the Tonto National Forest. In order to avoid any confusion as to the claims and portions of claims with which we are here concerned, we will recapitulate our earlier holding in Arthur C. W, Bowen, deceased, 14 IBLA 201, 80 I.D. 30 (1974), viz: this adjudication involves only the Superior Pearlite Nos. 3 and 4 placer mining claims in their entireties and those portions of Superior Pearlite Nos. 1 and 2 placer mining claims which are not occupied by the lode mining claims held by the Sil-Flo Corporation pursuant to the judgment of the state court in Bowen v. Sil-Flo Corp., 451 P.2d 626 (Super. Ct. Ariz. 1969).

claims occurs in lode formation. Consequently, the Arizona State Office found that the existence of perlite in lode formation would not impart validity to a placer claim located for that deposit.

Appellant attacks that decision on several grounds. First, appellant asserts that the Department of the Interior does not have the authority to question the validity of the claims since they are located in a national forest. Second, appellant asserts that the perlite deposit in question is properly locatable as placer. Finally, appellant asserts that it is entitled to patent under 30 U.S.C § 38 (1970).

[1] Appellant's argument that this Department lacks the authority to initiate contest proceedings against mining claims in national forests is predicated on a Memorandum of Understanding executed by the Forest Service and Bureau of Land Management, effective May 3, 1957. VI BLM Manual 3.1, Illustration 4 (June 21, 1962). That agreement provides that the Department of the Interior will provide the forum for any proper contest proceedings against unpatented mining claims which the Forest Service wishes to initiate. As appellant has pointed out, this Department has stated that, pursuant to the Memorandum of Understanding, supra, it is without authority to refuse to initiate a contest challenging the validity of a mining claim located in a national forest, if the elements of a contest are present. United States v. Bergdal, 74 I.D. 245 (1967). Appellant asserts that, therefore, the Department of the Interior has no authority to refuse patent if the Forest Service does not object.

The statutory division of jurisdiction between the Department of the Interior and the Forest Service occurred when the Forest Service was placed under the jurisdiction of the Department of Agriculture. The Act of February 1, 1905, 16 U.S.C. § 472 (1970), provided that the Secretary of Agriculture should execute all laws pertaining to lands within national forests, "excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any such lands." The execution of the laws excepted in that act remained the responsibility of the Secretary of the Interior. The policy the Department of the Interior has followed since the enactment of that law was stated by Secretary of the Interior in a letter to the Secretary of Agriculture dated June 5, 1908:

> * * * [T]he respective jurisdictions of the two departments over applications for rights and privileges within forest reserves may be safely defined as follows, namely,

> that your Department [Agriculture] is invested with jurisdiction to pass upon all applications under any law of the United States providing for the granting of a permission to occupy and use lands in forest reserve which occupation or use is temporary in character, and which, if granted, will in nowise affect the fee or cloud the title of the United States should the reserve be discontinued, but that this Department [Interior] retains jurisdiction over all applications affecting lands within a forest reserve the granting of which amounts to an easement running with the land * * * .

33 L.D. 609, 610 (1905).

Since that time the Department of the Interior has consistently exercised the exclusive authority, either on its motion or on the motion of others, to challenge the validity of mining claims in a national forest. H. H. Yard, 38 L.D. 59 (1909). Indeed, the Department of the Interior cannot delegate its authority to determine the validity of mining claims to another agency when the ultimate responsibility for that determination is placed by statute upon the Department of the Interior. What the Memorandum of Understanding purports to accomplish is to give the Forest Service an opportunity to challenge the validity of mining claims for any reason related to the management of the national forest. United States v. Bass, 6 IBLA 113 (1972). Such proceedings are nevertheless initiated and conducted by the Interior Department, with both the initial and final determinations as to validity of the claims resting with this Department. This has been the consistent practice of this Department, and was not changed by the Memorandum of Understanding. United States v. Dummar, 9 IBLA 308 (1973); United States v. Bergdal, supra, at 251. Cf. Duncan Miller, 6 IBLA 216, 79 I.D. 416 (1972).

[2] Appellant asserts that it is entitled to receive a patent pursuant to 30 U.S.C. § 38 (1970), which provides that:

> Where such persons or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto in the absence of any adverse claim; * * *

In a recent case, United States v. Guzman, 18 IBLA 109, 81 I.D. ___ (1974), this Board held that a mining claimant who has met certain fundamental requirements of the mining law, such as discovery, citizenship, and expenditure, and who has exclusively held and worked his claim for the period of adverse possession prescribed by the law of the state, is entitled to a patent regardless of the fact that the claim may have been improperly located as lode or placer, assuming no intervening loss of discovery. In this case appellant asserts that he has complied with the provisions of 30 U.S.C. § 38 (1970). Therefore, as it appears from the record that appellant may have done so, he is entitled to present additional evidence on that issue. 2/

[2] [3] Appellant is also entitled to a hearing on the nature of the deposit as placer or lode. When there is a disputed question of fact on a controlling issue, the claimants are entitled to a hearing on that issue. United States v. O'Leary, 63 I.D. 341 (1956); The Dredge Corporation, 65 I.D. 336 (1958). 3/ While it is true that most mineral deposits are almost as a matter of definition lode or placer, yet some embody enough characteristics of each to require a thorough determination of the factual nature of the deposit before the legal determination may be made. In this case it appears that expert geologists disagree on the nature of the deposit.

2/ One who asserts a possessory right pursuant to 30 U.S.C. § 38 has an obligation to make certain submissions as described in 43 CFR 3862.3. It does not appear from the record that appellant has, as yet, met this requirement.

3/ The argument has also been made that the Arizona State Office did not follow earlier instructions of this Board, since it did not provide a hearing before an Administrative Law Judge. While appellant should have been granted such a hearing, the previous decision of this Board merely held that an appropriate officer of this Department should make an independent determination of the character of the deposits, and did not expressly state that a contest must be initiated in the event such officer concluded that the deposits are lode. Estate of Arthur C. W. Bowen, deceased, 14 IBLA 201, 80 I.D. 30 (1974). The reference in that decision to an "independent determination" meant a determination independent of that made by the state court in private litigation. It did not mean, as contended by appellant, that the officer making the finding on behalf of BLM be independent of the agency.

Therefore, the Arizona State Office is directed to institute contest proceedings against these claims in order to determine whether appellant is entitled to a patent under the provisions of 30 U.S.C. § 38 (1970) and pertinent regulations (see fn. 2), and whether the perlite located on these claims is properly characterized as lode or placer. 4/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded for proceedings consistent with the views expressed herein.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Martin Ritvo
Administrative Judge

4/ Even if the appellant is found to have qualified to receive a patent pursuant to Section 38, it will still be necessary to determine the lode or placer character of the deposit in order to fix the purchase price.